

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

Kanowitz
RL-I

FILE: B-219327.4

DATE: October 8, 1985

MATTER OF: The W.H. Smith Hardware Company

DIGEST:

Where a small business concern is determined to be nonresponsible and the Small Business Administration refuses to issue a certificate of competency, GAO will not review this refusal unless the protester makes a prima facie showing of fraud or bad faith, or the failure to consider information bearing on the concern's responsibility. Disagreement over delinquency rate (37 percent versus 16.5 percent) does not amount to showing of bad faith.

The W.H. Smith Hardware Company (Smith) protests the contracting officer's determination that the firm was nonresponsible and the Small Business Administration's (SBA) refusal to issue Smith a certificate of competency (COC) in connection with solicitation No. DLA700-85-B-0286 issued by the Defense Logistics Agency (DLA).

We dismiss the protest.

In The W.H. Smith Hardware Company, B-219327, et al., July 24, 1985, 85-2 C.P.D. ¶ 82, Smith initially complained that in connection with this and four other solicitations, the SBA had delayed making final COC determinations in order to consider DLA reports which, according to Smith, improperly assessed the firm's delinquency ratio on prior contracts. Smith argued that the DLA's submission of these "erroneous" reports to SBA showed bad faith on the part of DLA contracting officials. We dismissed Smith's protest because the matter of Smith's responsibility was before the SBA which is authorized to determine conclusively the responsibility of small business concerns by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7) (1982). In this regard, we also explained that our Office limits its

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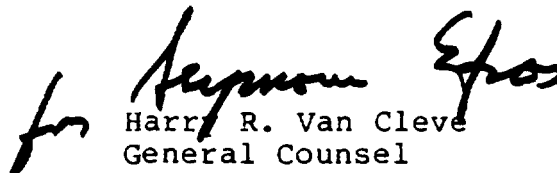
review of a denial of a COC to instances in which the protester makes a prima facie showing of fraud or bad faith on the part of contracting officials or that SBA failed to follow its own regulations or consider material information in reaching its decision. The W.H. Smith Hardware Company, B-219327, et al., supra.

Smith now argues that we should consider its allegation of bad faith because SBA declined to issue the firm a COC.

To establish bad faith, the courts and our Office require the presentation of virtually irrefutable proof that government officials had a "specific and malicious intent" to injure the protester. See A.R.E. Manufacturing Co., Inc., B-217515, et al., Feb. 17, 1985, 85-1 C.P.D. ¶ 162. Here, SBA's denial of the COC states that it was based on "all [the] information and data supplied" including reports submitted from both DLA and Smith concerning the firm's past performance record. While Smith disputes the conclusion reached by SBA because it disagrees with the delinquency rate in the contracting officer's referral (33 percent) and contends it should be 16.5 percent, this disagreement does not amount to a showing of bad faith or provide our Office with other grounds to undertake an independent review of SBA's decision. See Franklin Wire & Cable Company, B-218557, et al., May 7, 1985, 85-1 C.P.D. ¶ 511; J.E. McAmis, Inc., B-214516, July 16, 1984, 84-2 C.P.D. ¶ 51.

Smith also complains that the SBA improperly failed to consider this COC application separately from other COC applications the firm had filed with the SBA in connection with other procurements. However, Smith does not provide any evidence to show that its COC application was not properly evaluated or that the result would have been different.

The protest is dismissed.


Harry R. Van Cleave
General Counsel